

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

March 2018

President's Message

By Meshon Rawls



This month, I would like to weigh in on the Florida Bar's Mental Health and Wellness of Lawyers initiative. I commend the Board of Governors for creating the steering committee to develop ideas for addressing this issue. The establishment of this committee speaks volumes about the Florida Bar's commitment to its members,

and provides a platform to discuss and develop solutions to a problem that is often overlooked. I am very interested in the outcomes of the town halls that will occur across the state, and I especially look forward to the Town Hall the EJCBA will host on March 16th in collaboration with the Florida Bar's steering committee. We are among the first group of Voluntary Bar Associations to host a Town Hall, so we have the opportunity to set the agenda by voicing our opinions and thoughts on what the Florida Bar can do to preserve the quality and integrity of the profession.

In an article printed in the January 2018 edition of the Florida Bar Journal entitled *Mental Health and Wellness: Destigmatizing the Discussion and Promoting Solutions*, Dori Foster-Morales, the chair of the steering committee, stated, "We need to aid ourselves before we can aid others, as we cannot pour from an empty cup. The purpose of The Florida Bar is, in part, to improve the administration of justice. Enhanced mental health and wellness will bolster our ability to administer justice and are in the best interest of our members, both personally and professionally." Ms. Foster-Morales' viewpoint totally aligns with the approach I committed to taking this year in leading EJCBA. Programs are important, but people are more

important. There is tremendous value in investing in the lives of our members. When strategizing on how to help members deal with stress, we must consider the stressors associated with doing our jobs (the profession), and those associated with everyday life (the personal).

EJCBA has leaders who are forward thinkers. The conversation that we will have at the Town Hall will only be an extension of discussions that EJCBA leaders began during our leadership roundtables a few years ago. Work-life balance and being a happy lawyer have been central topics of discussion, and will certainly be interwoven in the dialogue on the mental health and well-being of lawyers. We get it, and I hope we will continue to build on the foundation that has already been laid by formulating solutions and implementing ideas. Our roundtable discussions have only touched the surface. When we have members within the bar who are taking their lives, falling into severe depression, or resorting to alcohol as a way to cope, we must press hard to identify and address the underlying issues.

As I consider how to address this from a voluntary bar association perspective, I don't even know where to begin. I don't know of many people, especially lawyers, who want to publicly share their struggles. The fear of being judged is real, and it is a barrier that will impede any progress that can be made. However, from my own experience in the EJCBA, I am learning that having a space where you can be honest with your colleagues about the realities in your life can reduce the stressors that are associated with "wearing the mask" – pretending that everything is okay when, in fact, it is not. I hope that in aiming to address the larger issues that we don't miss the opportunity to deal with the smaller ones that will

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Contribute to Your Newsletter! From The Editor

I'd like to encourage all of our members to contribute to the newsletter by sending in an article, a letter to the editor about a topic of interest or current event, an amusing short story, a profile of a favorite judge, attorney or case, a cartoon, or a blurb about the good works that we do in our communities and personal lives. Submissions are due on the 5th of the preceding month and can be made by email to dvallejos-nichols@avera.com.

About This Newsletter

This newsletter is published monthly, except in July and August, by:

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Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the Editor or Executive Director by Email. Also please email a photograph to go with any article submission. Files should be saved in any version of MS Word, WordPerfect or ASCII text.

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Deadline is the 5th of the preceding month

Alternative Dispute Resolution

By Chester B. Chance and Charles B. Carter



Mediation: Urban Legends

There are many myths, arguments, opinions, and urban legends one hears on a consistent basis at mediation. The following observations are routinely presented at mediation. Let's examine and discuss some.

Argument #1: *The cost of defense argument.* The plaintiff insists that the defense should at least pay the equivalent of the cost of defense. We suggest a discussion about how that idea often makes the defense go bonkers. It ignores any discussion of merit, facts or issues. It should be pointed out the plaintiff must also invest money and time in the case and so people in glass houses shouldn't throw stones. Perhaps refocusing on the merits of the facts and legal issues is more productive. If the facts and issues are troubling for the claimant, self-reflection and risk analysis are called for.

Urban Legend #2: *We didn't do anything wrong.* If the defense believes there is no liability then it often believes it should pay little or nothing even when the damages are significant. Studies suggest this is a potentially costly urban legend. When the defense puts all its eggs in the no liability basket, studies show the defense does prevail a significant amount of the time at trial. However, those same studies show that there is still a small yet significant percentage of cases (about 20%) where the plaintiff prevails and the average judgments in those cases are greater than the total likely settlement range which would have been possible in the cases in which the defense wins outright (without even considering the cost of defense plus the cost of paying the plaintiff's taxable costs). In fact, let's just say those judgments are eye popping. When the verdict is good for the defense it is very good, but, when it is bad it is often horrible.

Opinion #3: *The plaintiff has nothing to lose if they can't put money in their pocket.* The plaintiff argues that given the amount of the defense offer "the plaintiff puts nothing in their pocket so there is no reason for the plaintiff to settle." Well, often at that point the settlement offer is enough to pay medical bills as well as plaintiff's costs and plaintiff's attorney's fees, so the plaintiff is getting something after all. This opinion also suggests that the plaintiff will do better at trial, i.e., put something in their pocket when in reality there is a potential risk

of the plaintiff getting nothing, or getting less than the current offer, or, having a jury award reduced or wiped out by a triggered PFS, or, plaintiff and plaintiff's counsel getting nothing or both running in the red. The plaintiff's attorney also risks investing thousands of dollars in costs which may not be recovered. The 'nothing in their pocket' argument often does not stand up to scrutiny.

Myth #4: *Acupuncture treatment proves the plaintiff truly suffered a significant injury.* This argument works better in parts of China but should be used here if all else fails.

Argument #5: *The defense has also filed a declaratory action and is paying two attorneys, one for the tort action and one for the declaratory action; therefore, the defense should settle to avoid abnormally high fees and costs.* Yes, but the plaintiff's attorney also may be involved in both actions and exposed to double the time and costs. It is the same admonition: people in glass houses. . . . Also, the merits of the declaratory action and/or the tort action may give the defense two bites at the apple: no coverage and/or no liability or no/small damages.

Opinion #6: *The plaintiff has a pre-existing condition and therefore the defense owes nothing.* The plaintiff had a pre-existing condition and so the defense often suggests she/he was not hurt in this accident. Yes, but if the pre-existing condition was asymptomatic and now is symptomatic, or, if the condition was aggravated, then perhaps those points should be evaluated and considered by the defense.

Myth #7: *A minor impact in a motor vehicle accident does not mean the plaintiff was not injured.* People can be seriously hurt in a minor impact. That is a true statement. Not necessarily the strongest argument but still, a true statement. Studies show that low impact accidents coupled with pre-existing medical conditions often make for a tough sell. Not impossible, just tough.

Urban Legend #8: *People can never be hurt in a minor impact auto accident.* Sounds logical but this does not always seem to be the case. This puts all the focus on causation. All the eggs in one basket? Food for thought.

Opinion #9: *The plaintiff/defendant is not negotiating in good faith.* We hear this any time one

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Nominees Sought For 2018 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2018 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please complete a nomination form describing the nominee's qualifications and achievements and submit it to Raymond F. Brady, Esq., 2790 NW 43rd Street, Suite 200, Gainesville, FL 32606. Nominations must be received in Mr. Brady's office by Friday, May 4, 2018 in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar association and practice sections.

2018 EJCBA Charity Golf Tournament

"The Gloria: In Memoriam of Gloria Fletcher"

Please consider joining our team to help youth in our circuit who are in the dependency system enjoy the normal experiences that many of us may take for granted. All of the proceeds from the tournament go to The Guardian Foundation, which provides resources to children in our community who have been abused, neglected, or abandoned. We have made it possible, whether you're a golfer or not, to support the tournament; you can: [PLAY](#), [SPONSOR](#), or [DONATE](#).

This year's tournament will take place on Friday, March 2, 2018, at the UF Mark Bostick Golf course. Registration, lunch, and warm up will begin at 11:30 a.m. followed by a 12:30 p.m. tee time. The tournament format is a two-person or four-person scramble (player's choice). The registration fee is \$130 per golfer (early bird rate of \$115 if registered by February 16). Please contact Rob Birrenkott (Rbirrenkott@law.ufl.edu) to learn more about supporting the tournament.

Reserve Now for the EJCBA March 2018 Luncheon & CLE

WHEN: Friday, March 16, 2018 — 11:45 a.m.
WHERE: The Woolly — 20 N. Main Street, Gainesville, FL 32601
PROGRAM: University of Miami Professor Scott Rogers — "Theory of Mindfulness"
COST: **Members: \$17.00, Non-Members: \$25.00***
 Chef's choice luncheon buffet, including meat or vegetarian entrees, seasonal sides, and dessert
DEADLINE: Register on or before **Monday, March 12th at Noon at**
<http://www.8jcba.org/event-registration/mar-2018-luncheon/>

***\$25.00 for members and \$25.00 for non-members, not having made prior reservations.** If you are reserving at the last minute, or need to change your reservation, email Judy Padgett at execdir@8jcba.org or call **(352) 380-0333**. Note, however, that after the deadline, EJCBA is obligated to pay for your reserved meal and we make the same obligation of you. Thank you for your support.

Mental Health and Wellness Town Hall

The Florida Bar's Special Committee on Mental Health and Wellness of Florida Lawyers will hold a one hour town meeting immediately after the March Bar luncheon at 1 pm. It will be an interactive discussion with the Florida Bar including the luncheon speaker Scott Rogers and members of the special committee to discuss what services are available or are needed which could facilitate the mental health and wellness of our members.

Attendees will receive **1.0 CLE Credit in Mental Health**.



Mark your Calendars for Upcoming Events

E-Discovery Conference
Thursday, March 29, 2018

Spring Fling
Wednesday, April 4, 2018

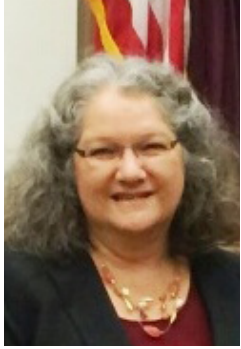
April Luncheon & Leadership Roundtable
Friday, April 13, 2018

Professionalism Seminar
Friday, April 20, 2018

Three Rivers Legal Services

40 Years of Civil Legal Aid

By Marcie Green



In April, Three Rivers Legal Services celebrates its 40th anniversary of providing free, civil legal services to north Florida's low income and vulnerable populations. It is hard to believe we have been in business for so long, accomplished and grown so much, served so many people, and grown such deep roots.

In the early 70s, a group of Gainesville attorneys and University of Florida College of Law professors banded together and formed a legal aid clinic known as Storefront Legal Aid. Local celebrities such as Larry Turner, Clara Gehan, Barbara Burkett and Ken Davis were instrumental in forming clinics and opportunities for attorneys to volunteer and clients to receive services. Three Rivers' attorney Judy Collins was one of Storefront's first staff members and Tom Williams, who later went on to law school and then returned as a staff attorney, was a paralegal funded through the newly created Vista program.

In 1977, Legal Services Corporation [LSC], a federal agency, made funds available to local legal aid programs. LSC was an offshoot of President Lyndon Johnson's War on Poverty and the Legal Services Act was signed into law by President Richard Nixon (more details of this history are described towards the end of this article).

Storefront Legal Aid joined forces with the legal aid branch of the Suwannee River Economic Council to form Three Rivers Legal Services and applied for funding from LSC. Three Rivers began serving seven north central Florida counties in 1978 with offices in Gainesville and Lake City led by Executive Director Robert Graddy (we just called him Graddy). That first staff consisted of three attorneys and three paralegals plus a small clerical staff. One year later, the service area increased to include 12 counties in the Eighth and Third Judicial Circuits, forming a service area the size of the state of New Jersey.

As a grantee of the Legal Services Corporation, Three Rivers' budgets have ebbed and flowed throughout the 40 years, based on the federal budget. When the Florida Bar founded The Florida Bar Foundation in 1981 and created the first Interest on Lawyers Trust Accounts program in the United

States, additional funding helped supplement the federal grants.

In 2004, under the directorship of Allison Thompson, Three Rivers opened a small LSC funded office in Jacksonville as part of a statewide restructuring of programs and services. LSC programs work under certain federal restrictions and a decision was made statewide to make sure that access to both restricted and unrestricted services was provided throughout the state. Three Rivers became one of Florida's smallest Legal Services programs serving some of the most rural populations. The area covers 17 counties and provides services from the Georgia border to the southern edge of Alachua County, and reaching across the State from the Atlantic Ocean to the Gulf of Mexico. Our regional partner program, Jacksonville Area Legal Aid, would provide the unrestricted services to this same region.

In these 40 years, Three Rivers has been involved in big issue projects such as protecting the rights of the residents of Kennedy Homes, working to ensure access to health care for low income residents under the Hill-Burton Act, advocating for the educational needs of children, and partnering with other legal providers to demand that disabled individuals receive care. Individually, Three Rivers staff and volunteers have represented clients in family law matters, landlord-tenant disputes, defense of mortgage foreclosure, access to veterans, disability and other public benefits, tax payer relief, and clearing title with probate to maintain homesteads.

Under the current leadership of Executive Director Chris Larson, Three Rivers now has 30+ grants and a staff of 20 attorneys, 3 paralegals, 9 support staff and a small administrative team. We have family law pro se, advance directives and small claims clinics, a Legal Helpline, and attorneys who specialize in housing, education, consumer and family law. We could not provide the services that we do without the support of our dedicated staff, volunteer attorneys and law students.

As we look back at some of the people who have worked with our program, we recognize our long history in the Eighth Judicial Circuit. Former employees, board members, supporters and volunteer attorneys are too many to list but include quite an impressive list of alumni. Staff attorney Judy Collins, who will be retiring this year, was here with Storefront Legal Aid

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How the New Tax Law Impacts Employee Benefits

By Laura Gross



The Tax Cuts and Jobs Act of 2017 makes some significant changes to employee benefits which may cause employers to rethink their compensation plans.

The Act limits the deductions employers can claim for employee benefits. Previously, employee transportation benefit programs allowed employees to use pretax

dollars and their employers to deduct their own contributions for employees' qualified mass transit, parking and bike benefits. Effective 2018, the Act eliminates the employers' deduction for employees' qualified mass transit, parking and bike benefits. It also eliminates the employer's deduction for onsite gyms and achievement awards (cash and cash-like awards). Effective 2025, payment of moving expenses will not qualify as a business deduction or tax exclusion for the employee and employee meals prepared onsite will not be deductible.

The Act eliminates employees' ability to deduct unreimbursed miscellaneous itemized business expenses on their personal tax return. Employees may still receive nontaxable reimbursement from the employer but, if the employer does not reimburse the business expense, that expense is no longer deductible by the employee.

Previously, commissions and performance-based compensation were not subject to the \$1 million limit for individual compensation that publicly traded companies can deduct on their tax returns. Now, the Act has amended this IRS code to include commission and performance-based pay and to expand the number of senior level employees to whom this limitation would apply.

The law also creates a paid leave tax credit for employers for certain employees who are on leave under the Family Medical Leave Act. The credit is allowed when the employer pays at least half of the wages for at least two weeks to an employee who is on FMLA leave. It only applies to employees who earn below \$72,000 per year. The employer is entitled to a tax credit of between 12.5% and 25% of the cost of each hour of paid leave depending on how much of the worker's regular earnings the paid leave is intended to place. The credit is 12.5% if the paid leave represents half of the employee's wages and up to 25% for full wage replacement.

Three Rivers

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and Alan Hill, our IT Director, started in 1978. I started in the fall of that first year. Gloria Walker has been with the program for 16 years, starting as an AmeriCorps paralegal while in law school. Some of our former attorneys went on to become law school professors or start their own firms. Our pro bono attorneys have become judges, and volunteer law students have gone on to other legal services programs and some to large firms.

A brief history of the federal program – The Economic Opportunity Act of 1964, part of President Lyndon Johnson's War on Poverty, provided the initial funding and impetus for the provision of legal help for the poor. Programs such as Head Start and Job Corps were part of the Act. Although legal services was not Johnson's greatest focus, he stated "To a great many poor Americans, the law has long been an alien force ... the Legal Services Program was created to give the poor the same access to the protection of the law that more fortunate citizens have. It is more than a legal aid program. It is a weapon in our comprehensive attack on the root causes of poverty...."

President Johnson's chosen head of the War on Poverty, President John F. Kennedy's brother-in-law, Sargent Shriver, placed an emphasis on legal services. He once remarked "... I am proudest of Legal Services because I recognized that it had the greatest potential for changing the system under which people's lives were being exploited. I was proud of the young lawyers who turned down fat, corporate practices to work for the poor, and proudest of them when they dared to challenge state and federal procedures and win."

Storefront Legal Aid, together with the legal program at the Suwannee River Economic Council, filed to incorporate and sought funding from the Legal Services Corporation in 1977. Forty years ago, Three Rivers opened its doors to become the provider of much needed free civil legal services to the poor. Throughout these 40 years, our mission remained clear: to provide quality legal assistance to the poor, abused, disabled and elderly and to empower through the use of preventive legal education.

Join Florida Supreme Court Chief Justice Jorge Labarga for an evening of celebration on Thursday, April 12 from 6 - 8 p.m. at the Florida Museum of Natural History; tickets are available at www.trls.org; contact me if you are interested in becoming a sponsor marcia.green@trls.org. We're looking forward to recognizing this significant milestone and we thank you for your support!

Probate Section Report

By Larry E. Ciesla



The Probate Section continues to meet on a monthly basis. Matters of interest, including those specifically discussed during recent meetings, are set forth below (in no particular order).

Coral L. Denton, Public Education Coordinator for LifeQuest Organ Recovery Services in Gainesville, gave a presentation regarding organ and tissue donation. Most people are generally familiar with the option of registering as a donor through the driver's license process.

Ms. Denton pointed out that other options are available for registering as an organ and tissue donor. One available option is to register online at www.DonateLifeFlorida.org, which has the added convenience of allowing registration without even leaving your home. Another option is to include an organ donation provision in a will, living will or health care surrogate designation.

Ms. Denton advises potential donors to discuss organ donation with family members in advance in order to avoid any last-minute family disputes.

Of particular importance is the little-known fact that an individual **must die on a ventilator** in order to facilitate organ donation. In a typical organ donation scenario, an individual may need to be kept alive on a ventilator for several days to allow the time to find an appropriate recipient and assemble the necessary medical professionals to harvest the organs and perform the transplant. This situation could potentially create a conflict with an individual's living will and/or health care surrogate designation, which typically contain language requiring that the individual not be kept alive by use of artificial measures.

Ms. Denton's suggested solution is for attorneys to include wording in their living will and health care surrogate forms to the effect that it is permissible to be kept alive artificially for a reasonable period of time to facilitate organ donation. She also pointed out that under such circumstances LifeQuest would cover all applicable hospital charges that may accrue while the donor is being kept alive on a ventilator.

Mirelis Torres and Katherine Mockler have switched their staff attorney assignments. Mirelis has taken over handling all Alachua County probate cases, and Katherine has taken over probate and

guardianship cases in Levy and Union Counties. Mirelis recently gave birth to a baby girl, and the Probate Section extends best wishes for good health to both mother and baby.

A new Tax Information Publication was issued by the Florida Department of Revenue on November 3, 2017 wherein the DOR states that copies of Inventories in probate estates should no longer be sent to the Department of Revenue. Furthermore, an estate should not serve the DOR with a Notice to Creditors unless the Department of Revenue is an actual creditor of the estate. Additional information may be obtained by calling the Department of Revenue at (850) 488-6800. Legal authority for the change in procedure can be traced, in part, to Chapter 2017-36, Laws of Florida, which amended Section 198.30, *Florida Statutes*.

Marynelle Hardee shared with the group that she is now assisting Judge Griffis as staff attorney handling probate cases for the counties of Baker, Bradford and sometimes Union. Marynelle pointed out that staff attorneys are still receiving paper copies or pdf's of proposed orders. She reminded everyone that all proposed orders need to be submitted to the staff attorneys electronically, in Microsoft Word format, in order to enable the staff attorneys to integrate the proposed order into the court's software program, which then adds its own signature line for the judge and certificate of service.

The Probate Section continues to meet on the second Wednesday of each month at 4:30 p.m. in the Chief Judge's Conference Room on the 4th floor of the Alachua County Family and Civil Justice Center, 201 East University Avenue, and all interested parties are invited to attend. Please contact Jackie Hall (352-378-5603 or jhall@larryciesla-law.com) to be included in the e-mail list for notices of future meetings.

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3215 Hull Road Gainesville, FL

GUEST SPEAKER
The Honorable Jorge Labarga
FLORIDA SUPREME COURT CHIEF JUSTICE

Chambers Lunch with U.S. Magistrate Judge Philip R. Lammens

March 22, 2018, starting at noon
United States District Court, Middle District of Florida, Ocala Division
Golden-Collum Memorial Federal Building and U.S. Courthouse

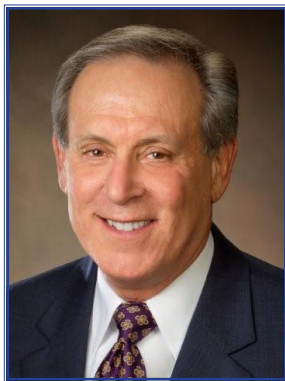
207 N.W. Second Street, Ocala, Florida 34475
\$15.00 for members, North Central Florida Chapter of the Federal Bar Association
\$25.00 for non-members (lunch included)

For more information and to RSVP, please contact Robert Griscti,

rob.griscti@dellsalter.com, 352/375-4460

Circuit Notes

The law firm of Turner O'Connor Kozlowski is proud to announce its recognition among the "Best Law Firms" for 2018 as ranked by US News and Best Lawyers®.



Carl Schwait
cschwait@uww-adr.com

Mediator Carl Schwait
*announces his availability to
serve in Gainesville, Ocala and
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Focusing On Mental Health And Wellness Of Lawyers

By Carl Schwait



I am pleased to be one of the five members of the Florida Bar's Special Committee on Mental Health and Wellness of Florida Lawyers. I am even more pleased that one of the first town meetings sponsored by the Florida Bar and the committee will be in Gainesville on March 16 following the Bar luncheon. It will be an interactive discussion with the Florida Bar including the luncheon speaker Scott Rogers and members of the special committee to discuss what services are available or are needed which could facilitate the mental health and wellness of our members. Attendees will receive 1 CLE credit in mental health. Below is an article by Florida Bar President Michael Higer on the committee's mission and the focus of the Florida Bar. I hope to see each of you in March.

Recognizing We Have a Problem: The Mental Health and Wellness of Lawyers¹

By Michael J. Higer

In my last column, I talked about "having a heart" – meaning practicing with passion, purpose, and meaning. For some members of the Bar, it doesn't always come easy. Part of having a heart means having a better understanding of ourselves and compassion for our colleagues. That is why the health and wellness of our members is paramount to The Florida Bar.

Flight attendants always remind us to first put on our own oxygen mask before assisting someone else. It is because before we can help others, we must first help ourselves. Simply put, our justice system depends on the health and wellness of the lawyers who are the advocates for justice.

Mental health issues touch all of us in every facet of our legal community – from solo small firm practitioners, who make up approximately 76 percent of the lawyers in Florida, to lawyers who practice in the public sector to lawyers who practice with large law firms, as well as law students. All of us face daily pressures and stresses that compromise our overall mental and physical health. If we are not healthy, it affects the health of our justice

system. It is, thus, critical for each of us, but also the public we serve, that we focus on the health and wellness of our lawyers.

In a 2015 Florida Bar membership survey, 33 percent of Florida lawyers reported high stress as a major problem; 32 percent reported that balancing work and family was a significant challenge; and seven out of 10 said they would change careers if they could. National studies are similarly alarming: Lawyers are twice as likely as the general population to commit suicide; the alcoholism rate for lawyers is double that of the general population; 33 percent of us suffer from diagnosed mental disorders; and we are 3.6 times more likely to suffer from severe depression. These numbers do not paint a healthy picture of lawyers.

Although heartbreaking, these numbers should not be surprising. We toil in a highly competitive, adversarial, profession, which is very demanding of our time and energy and where our success or failure often has a profound impact on the lives of the people we represent. We shoulder our client's burdens as if they are our own. We constantly work under severe time pressures. We search for definitive answers to questions in which there are only gray answers. We are accessible 24/7. All these stresses frequently lead us to sacrifice our own well-being. We not only take pride in our self-sacrifice, but we hide our struggles from our partners, our associates, our friends, and family.

That's why I am so proud of The Florida Bar Board of Governors for creating a Special Committee on Mental Health and Wellness of Florida Lawyers. This five-member committee, established in July 2017, and chaired by Governor Dori Foster-Morales of Miami, is already working to identify ways the Bar can destigmatize mental illness within our legal community and recommend practices to improve both the Bar's rules and programming.

We cannot solve or eliminate the stresses that we all face. But we can and must make a positive difference in identifying specific tools and ways to help attorneys lead healthier lifestyles and to be able to seek and receive help free of the stigma associated with mental illness. Having mental-health issues makes you no less of a person or a lawyer than suffering from physical illnesses – both affect many of us, and both can be treated.

The committee, which includes a mental-health professional, a judge, and a member of the Young Lawyers Division, is evaluating ways we can help

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Criminal Law

By William Cervone



I confess that today's topic is confusing because it involves the intersection of technology, which moves faster with each day, and the law, which moves at the pace of a moribund tortoise. But nonetheless it is of some interest, perhaps, and some importance, for sure. Texting, I mean, and the introduction of text messages, whatever they are,

legally speaking. I know what they are literally speaking - the modern equal of smoke signals, and the ruination of many a defendant, litigant, and cheating spouse, public figure or business partner.

Anyhow, let's start with Lesly Jean-Phillippe. He's a murderer, having killed his wife back in 2009. Their marriage was in disarray and they were estranged. Leading up to the murder, Lesly repeatedly called his wife and sent her multiple text messages - "I just wanna talk to you," "You told me to go to hell," "Talk to me please," and so on. All of these texts were admitted into evidence over Lesly's hearsay objection. Ultimately, the Florida Supreme Court held that the texts were not hearsay because, and this is one of my favorite legal dodges, they weren't offered for the hearsay purpose. Instead of being intended to prove that Lesly just wanted to talk to his wife, or perhaps that he should go to hell, they were merely proof of his conduct and motive, showing his increasing frustration and anger, and, I suppose, developing intent and motive. Besides, the court said, they were also admissible as admissions. So there you have it. Texts might not be hearsay but if they are they might still be admissible under some exception or other.

Let's then move on to Alvin Gayle. Alvin was 39 when he decided to take up with a 14-year-old girl who he met at a party thrown by his niece, a friend of the girl. Alvin, I'm thinking, is socially inept to start with but that's another story. Anyhow, as seems to be so often true in situations like this, Alvin couldn't help but text the object of his desire messages confirming their sexual relationship. After being nearly caught in the act, the girl's phone was subjected to a police search, which produced something the police called an "extraction report." This document amounted to a transcript of the no doubt lurid messages sent by Alvin.

Having been well informed by Lesly's situation, the State moved the extraction report into evidence - not offered to prove the truth of the matters asserted and

an admission besides. Bingo!

Well, maybe not quite. At least this time the 4th DCA wasn't buying the line about non-hearsay purposes. Probably the prosecutor shouldn't have stressed quite so much in his closing that the texts were the clearest possible evidence of Alvin's illegal amorous advances. So texts are maybe hearsay after all.

Fear not, the admission exception rides to the rescue! All's well, if not for Alvin at least for the prosecution. Had the DCA just left things there we might, however, have missed some nuances.

First, Alvin seems to have claimed that the text wasn't linked to him. But the victim said it came from him so no matter - that was good enough. I suppose that's a weight as opposed to admissibility thing. I don't know how the girl really knew who was using Alvin's phone, but the odds of it being someone else were about non-existent anyhow.

Next, the text might not be hearsay anyhow, at least as contained in the so-called extraction report, because a statement has to come from a person, and the report was something created by a machine that pulled it from the phone, another machine. The report, in fact, was more like a photograph than anything else, merely showing a part of the world at a given moment: the contents of the phone. There is no interpretation or assertion needed; it's just like the visible light in front of a camera lens that becomes a picture. It certainly is not a statement made by a declarant. Or at least so says the DCA.

And so, just like Lesly, off to prison with Alvin. Somewhere in all of this there is no doubt an issue for other courts to consider. I'd be surprised if we've heard the last of the admissibility of text messages.



EJCBA President Meshon Rawls, speaker John Stewart, Esq., and EJCBA Past President Stephanie Marchman following the February luncheon.

Clerk's Corner

By J.K. "Jess" Irby, Alachua County Clerk of the Circuit Court and Comptroller



2017 was a good year at the Clerk's Office. We efficiently and accurately processed over 305,000 new documents in civil court filings, maintained the court record on over 616,000 new documents in criminal cases, and recorded and safeguarded over 64,000 new documents in the official records.

We also protected and invested hundreds of millions of dollars for the county, while having a clean audit and receiving a certification for accounting excellence. In addition to all of that, we managed to do a DIY overhaul of the wedding ceremony room. So if love is in the air, come down to the Family and Civil Justice Center and have a top-notch ceremony.

2018 looks like it will be even better. We are rolling out several new services in the coming months. Do you want to join Mr. Cervone in Iceland, or Judge Chance in any other international destination but don't have a passport? I'm excited to announce we have been approved by the U.S. State Department to become an Acceptance Facility for passport applications. Skip the line at the post office and come apply for a passport now at the Family and Civil Courthouse.

Nothing can beat the skillful assistance of a trained attorney; however, as we know, many individuals are unable to afford or simply choose to not have the counsel of a lawyer when they venture into the court system. We are launching a new service called TurboCourt to help those without an attorney gain access to the courts. It works similar to TurboTax, in which an individual answers a series of questions and the program helps to draft pleadings. To begin with, it will be used largely for domestic violence injunctions in conjunction with our partnership with Peaceful Paths and the University of Florida in providing assistance with filing petitions. Some of the other filings the service can assist with include evictions, small claims, and family law matters. The goal of this service isn't to take away clients from anyone, but to open the doors to justice for those who previously couldn't gain access.

In 2017, we summoned over 20,000 jurors to the courthouses. Starting this month, we have launched a new juror donation program. Jurors who aren't compensated by their employer may now elect to donate their compensation. All donated funds will be given to our local Guardian Ad Litem program and to

our local domestic violence shelter, Peaceful Paths. This could make a significant impact if widely chosen.

2018 has also brought some personnel changes of note. Carol Ford has retired after 35 years in the Clerk's Office. Scott Dupree has been appointed the new Criminal Court Director. Mr. Dupree is a paralegal with 26 years of experience working in the Clerk's Office. Darnell Ingram has also been named our new Civil Court Director. Mr. Ingram has been with the Clerk's Office for the last decade, most recently serving as supervisor of the Civil Traffic Division. Please feel free to reach out to them if you have any questions involving their respective departments.

There are a couple issues we're seeing that you could help resolve as you begin your legal spring cleaning. First, we receive many court notices that are to be issued by the Clerk's Office that continue to show notice by or to the retired Clerk Irby. As you're tidying up your templates or word processor documents being submitted to the court, please make sure to amend them to reflect notice by or to J.K. "Jess" Irby.

Secondly, in Official Records we have been struggling to find a place on some documents to apply the recording information. Sometimes we'll receive a judgment or final order that has the court information blocked in the upper right-hand corner and we'll have to place the recording information anywhere that it will fit. For those practitioners who prepare judgments or final orders, leaving a 3-inch square in the upper right-hand corner as in Section 695.26, Florida Statutes, will help ensure we have accurate and accessible records in the future.

Thanks for your help. I'm working on crafting several more new programs at the Clerk's Office, but will share them later once fully developed. As always, if there is anything we can help with or you feel we could do better please don't hesitate to contact me.

It's that time again! The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2018-2019. Consider giving a little time back to your local bar association. Please complete the online application [here](#). The deadline for completed applications is May 7, 2018.

Consent Judgment: A Contract or a Judgment?

By Krista L. B. Collins



If the opposing parties to a lawsuit agree to the entry of a consent judgment, is the resulting piece of paper treated as a contract or a judgment? It would seem to have attributes of both. And in reviewing federal and state case law, numerous litigants have argued that consent judgments should be treated as contracts rather than judgments. Although

courts have noted that setting aside a consent judgment would be “undoing a binding agreement between the parties,” *Valpak Direct Mktg. Sys., Inc. v. Hyde*, 8:06-CV-347-T-26EAJ, 2006 WL 1982877, at *2 (M.D. Fla. 2006); also see *Curtiss-Wright Corp. v. Exhaust Parts, Inc.*, 144 So.2d 822 (Fla. 3d DCA 1962) (treating a consent judgment from a prior New Jersey lawsuit as a binding contract between the parties), courts have been equally clear that “a consent decree ‘has the same force and effect as any other judgment until set aside in the manner provided by law.’” *Valpak Direct* at *1 (quoting *United States v. Kellum*, 523 F.2d 1284, 1287 (5th Cir. 1975)).

Florida courts discussed this issue as far back as the 1926 case of *Hay v. Salisbury*, 109 So. 617 (Fla. 1926). While analyzing the issue of res judicata, the Florida Supreme Court quoted a New Jersey court in stating that, “The conclusiveness of a judgment upon the rights of parties does in no wise depend upon its form, or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is, in its nature, just as conclusive upon the rights of the parties before the court, as a judgment upon demurrer or verdict.” *Id.* at 621 (quoting *Gifford v. Thorn*, 9 N. J. Eq. 702, 722 (1855)).

In *Arrieta-Gimenez v. Arrieta-Negron*, 551 So.2d 1184 (Fla. 1989), the United States Court of Appeals for the First Circuit had certified two questions to the Florida Supreme Court. The second of those questions asked whether Florida courts would give res judicata effect to a consent judgment approving a property settlement, if it could be shown more than one year later that one party had fraudulently misrepresented or concealed material information from the other party. *Id.* at 1184-1185. The Florida Supreme Court noted that the misrepresentation at issue was intrinsic fraud, and as such, pursuant to Rule 1.540(b), *Fla. R. Civ. P.*, any challenge to the judgment was required to have been

brought within one year. *Id.* at 1185. In seeking to set aside a consent judgment some 23 years after it was entered, the appellant tried to distinguish between a consent judgment and a final judgment entered after trial on the merits. *Id.* at 1185, 1186. The appellant argued that because the judgment was a consent judgment, Rule 1.540(b), *Fla. R. Civ. P.*, did not apply. *Id.* at 1186. The Florida Supreme Court stated that:

The consent judgment in question stems from an order issued by a court of competent jurisdiction approving and confirming the settlement agreement entered into by the parties. While it is true, as appellant argues, that a consent judgment is a judicially approved contract, and not a judgment entered after litigation, it is a judgment nonetheless. As such, it is entitled to the same preclusive, res judicata effect as any other judgment issued by a Florida court. To hold otherwise would be contrary to our stated public policy of ensuring the finality of judgments.

Id.

Citing to *Arrieta-Gimenez*, the First District Court of Appeal has likewise held that the policy in Florida that strongly favors the finality of judgments is applicable regardless of whether the judgment is reached by consent of the parties or through contest. *Champlover v. City of Miami*, 667 So.2d 315, 316 (Fla. 1st DCA 1995), as clarified (*Dec. 19, 1995*).

Similarly, in *United Services Auto. Ass’n v. Jennings*, 731 So.2d 1258, 1259-1260 (Fla. 1999), the parties had entered into a stipulation that specifically stated it was the functional equivalent of an excess judgment, thereby allowing the respondents to file a third-party bad faith claim without having to go through the time and expense of a trial to obtain a final judgment. The petitioner sought to limit discovery based upon attorney-client and work-product privileges. *Id.* at 1259. The Florida Supreme Court approved the First District Court of Appeal’s holding that a third party in a third-party bad faith claim stands in the shoes of the insured and is entitled to discovery of the full claims file, notwithstanding objections based upon attorney-client and work-product privileges, and that this is so regardless of whether the claim was the result of a contested excess judgment or a stipulation. *Id.* The Court stated that in executing a stipulation for an excess judgment, “the parties agree

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LEADERSHIP ROUNDTABLE



The Eighth Judicial Circuit's diversity and inclusion conference sponsored by the Eighth Judicial Circuit Chapter of the Florida Association for Women Lawyers, Eighth Judicial Circuit Bar Association, The Florida Bar Diversity Leadership Grant, Josiah T. Walls Bar Association, and The North Central Florida Chapter of the Federal Bar Association

Intergenerational Relationships in the Legal Profession

April 13, 2018, 1:00 p.m. – 5:30 p.m.

The Leadership Roundtable immediately follows the Eighth Judicial Circuit Bar Association Luncheon beginning at 11:45 a.m. with Featured Speaker:

**Chief Justice of the Florida Supreme Court
Jorge Labarga**

Diversity Award

Submit your [nomination](#) by April 6th to recognize a member of our legal community who advances diversity, inclusion, and equality in the legal profession!



We encourage you to [support](#) future generations through Pace Center for Girls



Panel and Roundtable Discussions on Intergenerational Relationships

Stephanie Marchman will lead a workshop and panel discussion with representatives from each generation (including Baby Boomer Chief Justice Labarga) to better understand generational differences and commonalities, as well as identify potential tools for members of different generations to work together more effectively and enjoyably. The program will conclude with roundtable discussions and a networking reception.



The Woolly, 20 North Main Street, Gainesville, Florida 32601

Cocktail Networking Reception from 4:30-5:30 p.m.

The Roundtable is free for members of sponsoring organizations; \$50.00 for non-members. The Luncheon is \$17.00 for EJCBA Members; \$25.00 for Non-EJCBA members. Register for the Roundtable and/or Luncheon by April 9th at <http://www.8jcba.org/event-registration/apr-2018-luncheon-roundtable/> Space is limited and will be guaranteed on a first come, first serve basis only. 4 hours of Bias Elimination CLE anticipated.

Contact Stephanie Marchman at 352-281-1047 or stephanie.marchman@gray-robinson.com with questions.

President's Message

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ultimately morph into larger issues if left unaddressed.

I don't know the number of people who are suffering in the Eighth Circuit, and frankly the number doesn't even matter to me. I am reminded of a story about a good shepherd. The shepherd had one hundred sheep and one day he noticed that one of the sheep was missing. He had to decide if he would leave the ninety-nine sheep to go find the lost one. He ultimately decides that he would leave the ninety-nine to find the one, and subsequently becomes known as the good shepherd. Like the good shepherd, we should not allow *any* members of our profession who are struggling to drift off without going out and attempting to bring them back into the fold.

As a voluntary bar association, we are cultivating leaders, and part of our responsibility is to create an atmosphere where members can thrive and enjoy being a part of the profession. I challenge the EJCBA to stay in the forefront as leaders in finding ways to manage mental health and wellness issues. Combatting these problems will take more than one Town Hall; perhaps we have someone in the Eighth Circuit who is passionate about this endeavor, and would like to lead a committee that will work year-round in making sure members of the Eighth Circuit are provided with the resources that are available to those who may be in need.

In closing, I want to remind you, prior to the Town Hall, Professor Scott Rogers will be our luncheon speaker on March 16th. Professor Rogers is a nationally recognized leader in the area of mindfulness in law. He founded and directs the University of Miami School of Law's Mindfulness in Law program, and is the creator of the Jurisight, one of the first CLE programs in the country to integrate mindfulness and neuroscience. I hope you will join us for the luncheon from 11:45 am until 1:00 pm and stay with us for the Town Hall from 1:00 pm until 2:00 pm.

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Professionalism Seminar – SAVE THE DATE

Inexpensive & Enlightening CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, April 20, 2018 from 9:00 a.m. (registration begins at 8:30 a.m.) until Noon at the Trinity United Methodist Church on NW 53rd Avenue. Our speaker will be Mayanne Downs, past President of The Florida Bar, speaking on "A New Approach to Professionalism: Competence, Kindness & Millennials."

We expect to be approved, once again, for 3.5 General CLE hours, which includes 2.0 ethics hours and 1.5 professionalism hours.

Questions may be directed to the EJCBA Professionalism Committee Chairman, Ray Brady, Esq., at 373-4141.

See page 16 of this Forum 8 newsletter for reservation information.

REALTOR ETHICS?

When significant damages are claimed and a Realtor's professional conduct is blamed, an expert opinion may be in order.

Both plaintiffs' attorneys and insurance defense attorneys rely on Larry Lowenthal to help with complaints involving failure to disclose latent defects, Realtor Ethics, false advertising, agency, FS 475 & 61j, standard of care, negligence, fraud, malpractice, and procuring cause /commission disputes.

Retained for dozens of disputes in six states, Larry testified several times at depositions and trials. Visit his web site for the details.

Larry is a retired Florida real estate broker who earned a degree in Economics from the University of Chicago. *(His son, is a Gator!)* If you are prosecuting or defending a real estate broker, call Larry at (352) 372-2135.

Larry Lowenthal

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Consent Judgment

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and the courts recognize that a stipulated final judgment has the same force and effect as a final judgment reached through the usual judicial labor of a trial when the parties agree that it shall.” *Id.* at 1260. The Court went on to note that the parties could have included a limitation on discovery or other “conditions or limitations on the force and effect of the judgment” in the stipulation, but did not do so. *Id.* Accordingly, the Court held that a judgment reached by stipulation is to be given the same effect in the subsequent bad-faith litigation as a final judgment reached upon a determination at trial. *Id.* Also see *Newborn v. Isbell*, 165 So.3d 16 (Fla. 1st DCA 2015) (holding that the appellee could not go behind a stipulated judgment to argue the facts, when the stipulation provided that the judgment was to be treated as though the case had gone to trial and verdict had been rendered).

Whether a judgment is reached by verdict, motion or consent simply does not matter for purposes of finality. A judgment is a judgment—and that’s final!

ADR

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side or the other is annoyed at what is perceived as a low offer or high demand. This is a reaction, not a response. At mediation reactions add to frustration; responses move negotiations along. Many clichés turn out to be applicable and worth remembering, including: it is the last offer/demand we are interested in, not the first, second, etc.; 80% of the movement in a negotiation occurs in the last 10% of the time; mediation is successful approximately 85% of the time. Such positive thoughts may get us past the frustration of reacting rather than responding. Besides, in Florida, the concept of bad faith at mediation does not encompass the amount of offers and demands.

Debate #10: *Compromise is good but bargaining is bad.* Most people look favorably upon the concept of compromise. Compromise is imbued with concepts including reasonableness, open-mindedness, perspective sharing, etc. These are all good and admirable things. Bargaining, on the other hand is often looked upon in a negative fashion. It is what con-artists, legislators and sharp traders engage in. In the decades old book *How to be a Brit*, George Mikes notes the following: “Bargaining is a repulsive habit; compromise is one of the highest human virtues- the difference between the two being the first is practiced on the continent and the latter in Britain.” At mediation,

one side describes what it is doing as compromise and that the other side is engaged in bargaining. People tend to imbue their tactics as virtuous and the other side’s tactics as suspect. Bargaining, negotiation, compromise are all mere words. It is the attitude, analysis, objectivity, reasonableness, and honesty that separates the concepts.

Argument #11: *This case might have settled if the mediator had provided better snacks.* Very true indeed. We hear you and are working on it.

Mental Health

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– whether through the creation of peer-counseling resources or enhanced member benefits that focus on physical exercise, diet, personal health, and stress reduction training and exercises.

The committee has also been tasked with providing a comprehensive plan of action by May 2018. Potential initiatives include the creation of dedicated CLE courses on mental-health training; identification and distribution of handbooks and toolkits to help guide law firms and other employers on best practices; and an online support group or hotline.

To raise awareness, the Bar is partnering with local bar associations to host town halls across the state and will hold a statewide town hall this month during the Bar’s Winter Meeting in Orlando. The theme of the 2018 Florida Bar Annual Convention in June will be health and wellness. Please make your voice heard – we need your input.

Just a short time ago, our legal community lost one of our most vocal champions for mental health. Michael Cohen, executive director of Florida Lawyers Assistance, spent 20 years of his life advocating for attorneys struggling with substance abuse and mental illness. He also fought his own battle with addiction.

Cohen was a life-support and safety-net to so many in need. Although he will be deeply missed, my hope is that we not only continue his legacy of support and compassion but that we will create an established means for doing so.

Together we can and will make our individual and collective health and wellness a priority, which will yield personal growth for each of us, for our profession, and make us better advocates for justice.

1 Reprinted with permission from The Florida Bar Journal/January 2018

Reserve Now for the EJCBA 2018 Professionalism Seminar

<p>WHEN: Friday, April 20, 2018 – 9:00 a.m. – 12:00 NOON</p> <p>WHERE: Trinity United Methodist Church 4000 NW 53rd Avenue, Gainesville, FL 32653</p> <p>PROGRAM: Mayanne Downs, Past President of The Florida Bar, speaking on “A New Approach to Professionalism: Competence, Kindness & Millennials”</p> <p>COST: EJCBA paid members: \$50, Non-Members: \$100</p> <p>CLE: 3.5 Hours of CLE is expected</p> <p>DEADLINE: Register on or before Monday, April 16, 2018 at: http://www.8jcba.org/event-registration/2018-professionalism-seminar/</p>	<p>When registering online, you will need to select your first and second choices for your area of specialty for small group discussions from the following four options:</p> <p>Family/Domestic Relations Law</p> <p>Criminal Law</p> <p>Civil Trial (e.g. Torts, Commercial & Government)</p> <p>Civil Non-Trial (e.g. Transactional, Estates and Trusts, & Real Estate)</p>
<p>Parking:</p> <p>Free parking is provided. Arrive early to allow sufficient time to check-in and find your seat.</p>	

March 2018 Calendar

- 2 EJCBA Annual Charity Golf Tournament – “The Gloria,” benefiting the Guardian ad Litem Program, UF Mark Bostick Golf Course, 11:30-5
- 5 Deadline for submission to April Forum 8
- 14 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 16 EJCBA Luncheon, Professor Scott Rogers, “Theory of Mindfulness,” The Woolly, 11:45 a.m.
- 16 EJCBA Free CLE – Panel Discussion on “Focusing on the Mental Health & Wellness of Florida Lawyers,” 1:00-2:00 p.m.
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 29 UF Law E-Discovery Conference
- 30 Good Friday Holiday – County courthouses closed

April 2018 Calendar

- 4 EJCBA Board of Directors Meeting – Thomas Center, 5:00 p.m.
- 4 EJCBA 4th Annual Spring Fling, Thomas Center Outdoor Garden, 6-8 PM
- 5 Deadline for submission of articles for May Forum 8
- 11 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 13 EJCBA Luncheon, Chief Justice of the Florida Supreme Court Jorge Labarga, The Woolly, 11:45 a.m.
- 13 EJCBA Leadership Roundtable, “Intergenerational Relationships in the Legal Profession,” The Woolly, 1:00-5:30 p.m. (with cocktail networking reception from 4:30-5:30)
- 17 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 20 EJCBA Annual Professionalism Seminar, Mayanne Downs, “A New Approach to Professionalism: Competence, Kindness & Millennials,” 9:00 a.m. -12:00 p.m. (registration begins at 8:30), Trinity United Methodist Church, NW 53rd Avenue

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule to let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.